No. 15782

United States
COURT OF APPEALS
for the Ninth Circuit

ADOLPH G. HOFFMAN,

Appellant,

v.

C. H. HALDEN, DR. DONALD E. WAIR, DR. G. F. KELLER and DR. F. SYDNEY HANSEN,

Appellees.

BRIEF OF APPELLEES C. H. HALDEN and DR. F. SYDNEY HANSEN

Appeal from the United States District Court for the District of Oregon

HONORABLE WILLIAM G. EAST, Judge

LEO SMITH, District Attorney, Multnomah County,
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Attorneys for Appellees, C. H. Halden and Dr. F. Sydney Hansen.

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STATEMENT OF THE CASE

For purposes of this brief, the statements of the case set forth in the filed briefs of appellants, Dr. Donald E. Wair and Dr. G. F. Keller, are herein adopted as correct recitations of the general history of this appeal. With regard to the appellants, Dr. F. Sidney Hansen and C. H. Halden, by whom this brief is filed, it can be added that

the former was and is the duly appointed and acting County Health Officer of Multnomah County, Oregon, and C. H. Halden was and is his duly appointed and acting Deputy Health Officer (Tr. 4).

SUMMARY OF ARGUMENT

I.

The second amended complaint of plaintiff fails to state a claim against the appellees Hansen and Halden under the Civil Rights Act.

POINT AND AUTHORITIES 1

The propositions of law as stated in the filed brief of appellee, Dr. Donald E. Wair, under Points and Authorities 1 and 2 of Summary of Argument I, are in conformity with the position of the appellees Hansen and Halden and are herein adopted and incorporated within this brief. Additional authorities in support of these propositions are here provided:

ORS 431.410;
ORS 431.440;
OCLA 99-201;
Ortega v. Ragen, 216 F.(2d) 561 (CA 7, 1954);
Smith v. Mozier, 148 F. Supp. 638 (D.C. Mich. 1957);
Thompson v. Heither, 235 F.(2d) 177 (CA 6, 1956);
Peckham v. Scanlon, 241 F.(2d) 761 (CA 7, 1957);
Cuiska v. City of Mansfield, 250 F.(2d) 700 (CA 6, 1957);
Dunn v. Gazzola, 216 F.(2d) 709 CA 1, 1954);
Whittington v. Johnston, 201 F.(2d) 810 (CA 5);

Dinwiddie v. Brown, 230 F.(2d) 465 (CA 5, 1956); Agnew v. City of Compton, 239 F.(2d) 226 (CA 9, 1956), Cert. den. 353 U.S. 959, 77 S. Ct. 868, 1 L. Ed. (2d) 910.

II.

The claim alleged against the appellants, Dr. F. Sidney Hansen and C. H. Halden is barred by the applicable Oregon Statute of Limitations.

POINT AND AUTHORITIES 1

The propositions of law and authorities in support thereof as contained in the brief of Dr. Donald E. Wair under Points and Authorities 1 and 2, Summary of Argument II, are in conformity with the position of the appellees, Hansen and Halden, and are herein incorporated and adopted in this brief.

ARGUMENT

I.

The arguments in support of the foregoing propositions of law contained in the brief of the appellee, Dr. Donald E. Wair, insofar as they apply to the appellees Hansen and Halden, are herein adopted and incorporated. It is clearly apparent from the authorities contained therein, that the legislative intent of the enactors of the Civil Rights Act was never to abrogate or lessen the common law immunity from tort liability which a long line of legal decisions has established for the judiciary. Likewise it is apparent that this immunity would be a thing of

little value if it were only exercised in favor of those who possess the title of judge, and this is reflected in the wealth of cases stating this truth and applying the same protection to quasi-judicial officers as well.

This has been stated in *Miller v. Director, Middleton State Hospital,* 146 F. Supp. 674, 677 (S.D.N.Y., 1956), affirmed 243 F.(2d) 527, cert. den — U.S. —, 78 S. Ct. 124, 2 L. Ed. (2d) 78.

> "For this reason, I have inquired into the possibility that the Civil Rights Act may provide a cause of action for the plaintiff. It is not necessary, however, to determine whether the allegations in the complaint are sufficient to satisfy the essential elements of an action under this Act, since even if they are, the defendant would still be immune from liability. It now appears to be well settled that the Civil Rights Act did not abolish some of the well-established common law immunities such as those for legislators, judges and persons in other quasi-judicial positions. To the extent that the director was called upon to exercise discretion in determining when the plaintiff should be discharged, he was exercising a quasi-judicial role and is therefore immune. To the extent that he was merely executing the order of the State Supreme Court justice his immunity is equally clear. *It would certainly be paradoxical to grant immunity to the judge entering the order and yet impose liability on those executing it.*" (Emphasis supplied)

The modern cases have followed this reasoning and have specificially applied it in favor of the following quasi-judicial officers in cases brought under the Civil Rights Act, where in each instance, the court determined the officer immune from civil liability:

1. Prosecuting Attorney—*Kenny v. Fox,* 232 F.(2d) 288 (6th Cir., 1956) cert. den. 352 U.S. 855, 856, 77 S. Ct. 84, 1 L. Ed (2d) 66.

2. Warden of Penitentiary—*Ortega v. Ragen,* 216 F.(2d) 561 (CA 7, 1954).

3. Judge, Prosecutor, and Deputy Sheriff—*Smith v. Mozier,* 148 F. Supp. 638 (D.C. Mich. 1957).

4. Judge, Prosecuting Attorney, Chief Assistant Prosecuting Attorney, Police Commissioner, Police Officers—*Thompson v. Heither,* 235 F.(2d) 177 (CA 6, 1956).

5. Judge, Assistant State's Attorney, Court Reporter, Warden of Penitentiary—*Peckham v. Scanlon,* 241 F.(2d) 761 (CA 7, 1957).

6. State's Attorney, First Assistant State's Attorney, and Foreman of Grand Jury—*Cawley v. Warren,* 216 F.(2d) 74 (CA 7, 1954).

7. Judge, Probation Officer, Police Chief, Police Sergeant—*Dunn v. Estes,* 117 F. Supp. 146 (D.C. Mass. 1953).

8. Judge and Four Police Officers—*Cuiska v. City of Mansfield,* 250 F.(2d) 700 (CA 6, 1957).

9. City Electrical Inspector, and Two Police Officers —*Agnew v. City of Compton,* 239 F.(2d) 226 (CA 9, 1956), cert. den. 353 U.S. 959, 77 S. Ct. 868, 1 L. Ed. (2d) 910.

For this inquiry the appellees Hansen and Halden are beyond question quasi-judicial officers, in that they are

County Health Officers. The court will take judicial cognizance of the applicable Oregon Statutes and in doing so will note the provisions of ORS 431.410 which, at the time of the acts alleged in the complaint, were contained in OCLA 99-201.

> "(1) The county judge and county commissioners . . . shall constitute a board of health ex officio, for each county and city, respectively, of the state, whose duty it shall be to: * * * "
>
> "(2) Each local board shall select a secretary, who shall be in possession of a license issued to him by the State Board of Medical Examiners, who shall be the health officer of the appointing board and so commissioned by the State Board of Health * * *."

ORS 431.440, formerly OCLA 99-201, provides:

> "All county and city health officers shall possess the powers of constables or other peace officers in all matters pertaining to the public health."

From the material allegations of the complaint (Tr. 4-9) it can be seen that the action of the appellees was squarely within their prescribed duties and jurisdiction, as the executive arm of the court, and while they "were acting in their official capacities and within the scope of their jurisdiction and authority, they were immune from civil liability to the plaintiff." *Smith v. Mozier,* supra, at page 639.

Analyzing the balance of the complaint after the separation of the material portions therefrom, we find many unfounded conclusions of alleged wrongs which, if in fact true, might constitute a violation of due process as to the plaintiff; but which on analysis, can only be deemed to be breaches of duties that lie solely with the court and

not with the appellees here, e.g., the right to select a physician of his choice, the right to counsel, the right to witnesses, etc. (Tr. 3-7), *Cuiska v. City of Mansfield,* supra, and Dunn v. Gazzola, 216 F.(2d) 709 at 711 (CA 1, 1954), wherein it was stated,

> "With regards to the actions of Gazzola and Marron previous to the trial, the notification by Gazzola and service of the complaint by Marron subjected the plaintiff to trial, but not to an 'unfair' trial. The control of the trial was exclusively within the province of the court * * * other allegations against the officers with regard to their failure to give proper notice of trial or to advise the plaintiff of her right to counsel are even more frivolous; the court, not the arresting officers, has the duty to give an accused whatever notice and whatever advice are required."

To the second amended complaint, were added allegations that the acts of the appellees were done "wilfully" and "maliciously," but these do not render it any more effective or sufficient, for as stated in *Whittington v. Johnston,* 201 F.(2d) 810, at 812 (CA 5),

> "Plaintiff alleges that in instituting the lunacy inquisition, the defendants acted wilfully and maliciously. But this adds no strength to the complaint under 8 U.S.C.A. Sec. 43. Neither the Fourteenth Amendment nor the Civil Rights Act purport to secure a person against unfounded or malicious lunacy proceedings. If the facts here involved make out a case of false arrest or malicious prosecution, the redress of such wrongs is left with the states."

A further attempt to bring the appellees within the act, is the use of the allegations as to conspiracy, but this as well does not aid the plaintiff in his task. In *Dinwiddie v. Brown,* 230 F.(2d) 465 (CA 5, 1956), at page 469, the court said,

> "Merely characterizing their conduct as conspiratorial or unlawful does not set out allegations upon which relief can be granted."

Remaining after the exclusion of the above allegations from the compaint, we can only find extensive conclusory statements that the purpose of the appellees' act was to intimidate and coerce the plaintiff from "exercising and availing himself of due process and the due course of law" (Tr. 7) "under the Constitution of the United States and the laws of the State of Oregon" (Tr. 9). General allegations of this kind have consistently been rejected for the purpose of providing sufficiency to an otherwise insufficient complaint. *Agnew v. City of Compton,* supra.

Allegations of another nature are made in that the plaintiff complains that the appellees conspired to deprive him of equal protection of law and that they purposely and intentionally discriminated against him. Such contention, when completely unsupported by facts indicating in what fashion the plaintiff was treated differently from others in the same situation, has always been denied by the courts. *Dunn v. Gazzola,* supra, *Ortega v. Ragen,* supra.

ARGUMENT

II.

The arguments in support of the proposition of law that the claim against the appellees herein is barred by the applicable Oregon Statute of Limitations as set forth in the filed brief of the appellee, Dr. Donald E. Wair, are herein adopted and incorporated in this brief, insofar as they apply to the appellees, Hansen and Halden.

CONCLUSION

We are here presented with a situation in which, on two occasions, the plaintiff has presented to the United States District Court, for the District of Oregon, a complaint purporting to allege a claim against certain persons and public officers of the State of Oregon. In each instance, it was the considered opinion of that court, that the complaint did, in fact, fail to state a valid claim for relief. These decisions were correctly made, for as shown above as to the appellees Hansen and Halden, they are immune from liability to the plaintiff by virtue of their quasi-judicial position. Nowhere in the complaint can we find any sufficient grounds for removing this protection from them.

> "Thus from what has been said, it is crystal clear that certain public officials, at least those exercising quasi-judicial functions, acting within the sphere of their duties enjoy the same absolute privilege as judges and the reason for the policy is, as Judge Hand states in Gregoire v. Biddle, 2 Cir., 177 F.(2d) 579, 580, 581, to permit public officials to act unflinchingly in the discharge of their duties and without a constant dread of retaliation." *Dunn v. Estes,* supra, at 148.

It is respectfully submitted on behalf of the appellees Dr. F. Sidney Hansen and C. H. Halden, that the judgment of the court below, dismissing the appellant's action against them should be affirmed with costs.

Respectfully submitted,

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